BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 97-301-E - ORDER NO. 98-867

NOVEMBER 5, 1998

IN RE: Hartsville H.M.A., Inc. and Carolina Power & Light Company, Complainants, vs. Pee Dee Electric Cooperative, Inc., Respondent.	ORDER RULING ON REHEARING

This matter comes before the Public Service Commission of South Carolina (the Commission) on rehearing of the Complaint of Hartsville H.M.A, Inc. (Hartsville or HMA) and Carolina Power & Light (CP&L) (together, the Complainants) against Pee Dee Electric Cooperative, Inc. (Pee Dee or the Coop.). The Complaint involves the provision of electric service to the new Byerly Hospital complex, owned by Hartsville HMA, Inc., to be located on a 33.5 acre tract of land near the City of Hartsville. According to the original Complaint, the vast majority of the tract of land, and all of the portion upon which the buildings will be constructed, is in an area that was never assigned by the Commission to any electric supplier, although later testimony and exhibits showed that a portion of the land was assigned to CP&L. The Complainants

stated their belief that a "customer choice" situation existed, whereby Hartsville could choose whichever electric supplier it desired. Accordingly, Hartsville chose CP&L as its electric supplier, as opposed to Pee Dee. On or about May 22, 1998, the Complainants filed an amendment to the original Complaint, stating that a survey of the property and an analysis of the territorial boundaries and locations of lines as they relate to the planned location of the new hospital and its support buildings had recently been conducted. According to the amendment, the new survey and analysis demonstrate that all of the energy plant building and portions of the hospital and medical office building will be located within CP&L's assigned territory. Also, according to the Complainants, the survey and analysis also demonstrate that none of these buildings will be located entirely within 300 feet of an old line that Pee Dee was required by Court Order to remove. Therefore, according to the Complainants, because of these and other reasons, the choice of electric supplier is, pursuant to S.C. Code Ann. Section 58-27-620 (1976), a customer choice situation, and Byerly Hospital, pursuant to Hartsville H.M.A., has chosen CP&L as its electric supplier.

Pee Dee states that it has previously serviced a premise located within the subject property, and continued to maintain in place lines and poles on the tract of land so as to preserve its service rights. Accordingly, Pee Dee states, as per its original counterclaim, that the HMA site is within its assigned territory and corridor rights, and because the surrounding tract is in unassigned territory, that Pee Dee has the right to supply electric service to Hartsville H.M.A., and that, indeed, Hartsville H.M.A. had chosen Pee Dee as its electric supplier. Pee Dee alleges that it has an enforceable contract in that regard, and,

that, in addition, Hartsville H.M.A. is estopped from denying its choice of Pee Dee as its electric supplier, and further estopped to deny the contract with Pee Dee.

Accordingly, after the issuance of various prior procedural Orders, the Commission held a hearing on this matter on June 5, 1998 in the offices of the Commission, with the Honorable Guy Butler, Chairman, presiding. Hartsville H.M.A., Inc. was represented by Mark W. Buyck, Jr., Esquire. Carolina Power & Light was represented by William F. Austin, Esquire and Len S. Anthony, Esquire. Pee Dee Electric Cooperative, Inc. was represented by Arthur G. Fusco, Esquire, Wilburn Brewer, Esquire, and C.F.W. Manning, II, Esquire. Florence P. Belser, Staff Attorney, represented the Commission Staff.

The Complainants jointly presented as witnesses Dennis J. Turner, Wade H. Hicks, Emerson Gower, and Page H. Vaughan. The Coop. presented the testimony of Al Lassiter, Robert Williams, and Brian Kelley. The Commission Staff presented no witnesses.

On June 16, 1998, this Commission issued Order No. 98-450, which held in summary, that this was a customer choice situation, and that Hartsville HMA had the right to choose CP&L as it electric supplier. On July 9, 1998, we issued Order No. 98-533, granting rehearing and reconsideration of Order No. 98-450. We stated in Order No. 98-533 that the basis for the motion to reconsider was that an earlier vote to deny reconsideration was based upon matters outside the record, i.e. alleged desires of persons residing in the geographical area involved when there was no evidence presented at the hearing in this regard, and upon the basis that the Commissioners had taken an erroneous view of the evidence and law pertaining to customer choice and equitable estoppel.

Accordingly, on September 10, 1998, a rehearing was held with the same witnesses and same attorneys as the original hearing. The Honorable Philip T. Bradley, Chairman, presided. As explained in full below, we must affirm our original Order No. 98-450. We reaffirm our original holding that the case at bar presented a customer choice situation, and that Hartsville HMA had the right to choose CP&L as its electric supplier. No matters outside the record were relied upon in making this decision. Also, after rehearing, we are convinced that our original view of the evidence and law was the correct view. Further explanation is given below.

As with the original proceeding, we will consider this case based on the allegations of the original complaint filed by Hartsville and CP&L, which is addressed by the testimony and exhibits in the record.

First, a review of the testimony of Page H. Vaughan, Director for Hartsville H.M.A. doing business as Byerly Hospital, again leads us to conclude that Hartsville HMA never chose Pee Dee for the provision of electric service. Vaughan stated that he alone never had authority to make such a choice with either Pee Dee or CP&L, and that he made it clear to the suppliers that any such agreement for service and, therefore, any choice, would have to be an agreement in writing and signed by Vaughan and approved by the Hartsville H.M.A. corporate office. Pee Dee presented testimony to the effect that Vaughan met with its representatives on February 14, 1997 and verbally agreed to take electric service from the Coop., and that Vaughan shook hands on the agreement. Vaughan testified that, although there was a meeting on that date, the parties were still negotiating various terms of a possible agreement. Two proposed electric agreements were later faxed to Vaughan at different times, but according to Vaughan, these

agreements were never executed. Quite simply, we hold that no choice of Pee Dee as the electric supplier was ever made, nor was any contract for electric service ever executed between Hartsville H.M.A. and Pee Dee, despite Pee Dee's assertions to the contrary. Vaughan simply did not have the authority on his own to make such a choice, or execute such an agreement.

It is well established in South Carolina that a valid contract only exists if there has been an offer, an acceptance and a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement. (Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (1975); and Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989)). The "meeting of the minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. (Player v. Chandler, supra). Finally, the terms of the contract must be so clear, definite, certain, and precise, and free from obscurity or self contradiction that neither party can reasonably misunderstand them, and the court can understand them and interpret them, without supplying anything. (White v. Felkel, 222 S.C. 313, 72 S.E.2d 531 (1952)). As explained below, there was no offer and acceptance, and therefore no meeting of the minds between Hartsville and Pee Dee on the material terms and conditions of the alleged contract.

All parties agree that beginning in 1996, H.M.A. negotiated with Pee Dee and CP&L for the provision of electricity to the new Byerly Hospital on South Carolina

Highway 151 near the City of Hartsville. Both CP&L and Pee Dee made offers involving the installation of facilities, rates, and economic development incentives.

On February 14, 1997, H.M.A.'s representative, Page Vaughan, met with three Pee Dee representatives; Brian Kelley, Robert Williams and Ken Williams. All parties agree that the purpose of the meeting was to discuss the incentive package being offered by Pee Dee, the term of Pee Dee's proposed agreement, and the placement of certain Pee Dee facilities located in front of the new hospital underground. It is undisputed that these issues were discussed. What is in dispute is whether after these discussions, a verbal agreement was entered into between H.M.A. and Pee Dee for the provision of electricity to the new Byerly Hospital.

Robert Williams and Brian Kelley claim that during the meeting Pee Dee agreed to Mr. Vaughan's request to shorten the term of Pee Dee's offer from 10 years to 5 years and to place Pee Dee's facilities along Highway 151 underground. Having agreed to make these changes, Pee Dee claims Mr. Vaughan then shook hands with Mr. Williams and indicated his acceptance of Pee Dee's offer to be the electric supplier of the new hospital. In contrast, Mr. Vaughan testified that the Pee Dee representative stated that it would require the approval of Pee Dee's Board of Directors to shorten the term of the proposal from 10 years to 5 years; he explained to Robert Williams, Ken Williams and Brian Kelly that he did not have the authority to bind H.M.A., rather any agreement had to be approved by H.M.A.'s president, and no agreement was reached. Thus, we have witnesses for one party swearing there was a valid offer and acceptance while the witness for the other party swears there was not. As a result, it is appropriate to look at the other facts surrounding and following this meeting.

Two weeks after the meeting, on February 28, 1997, Pee Dee faxed Mr. Vaughan a proposed Letter of Intent and Electric Service Agreement.

The Letter of Intent begins with the following sentence:

> "This will serve as formal notification to Pee Dee Electric Cooperative, Inc. (hereinafter "Cooperative") that Hartsville HMA, Inc. D.B.A. Byerly Hospital (hereinafter "Byerly Hospital") intends to enter into an Agreement (emphasis added) for Electric Service with the Cooperative to provide electric service for a connected load of approximately 4,000 kW at initial full facility operation for a hospital facility to be established on an approximately 30 acre site on South Carolina Highway 151 bypass (West Bo Bo Newsome Highway) southwest of Hartsville in Darlington County."

The final substantive paragraph of the Letter concludes:

> ". . . Byerly Hospital requests that in consideration of this letter of intent Cooperative and Cooperative's wholesale electric supplier, Central Electric Power Cooperative, Inc. (hereinafter "Central"), begin routing, environmental and archeological studies, survey, design, and other such activities as are necessary to plan and locate the necessary electrical facilities. In the event Byerly Hospital decides not to establish the facility, Byerly Hospital agrees to bear the cost for these activities. . . "

This Letter of Intent demonstrates that the parties did not intend to be bound until a formal electric service agreement had been executed by both parties. It explicitly states that the parties intend to enter into an agreement, but of course the Letter of Intent was never signed so the parties never even agreed to agree. More importantly, the Letter of Intent provides that once H.M.A. signs the Letter of Intent, Pee Dee and Central will proceed to perform engineering and routing analyses after its execution by H.M.A. If after signing the Letter of Intent H.M.A. then decided not to pursue the project, H.M.A.'s only liability would be to reimburse Pee Dee and Central for their out-of-pocket expenses. Again, apparently any alleged meeting of the minds on February 14 was inadequate to justify Pee Dee incurring the routing and design costs associated with

providing service to H.M.A. In addition, even if H.M.A. had signed the Letter of Intent, it still was not required to take service from Pee Dee, only to pay for any costs incurred by Pee Dee or Central at the time of cancellation. The fact of the matter is this Letter of Intent was never signed by H.M.A., thus H.M.A. is not bound by any of its terms.

The proposed Agreement for Distribution Electric Service that accompanied the February 28, 1997 transmittal letter (in other words the Pee Dee offer) was the first of two offers made by Pee Dee to H.M.A. after the February 14, 1997 meeting. A second offer was made on March 26, 1997. The February 28, 1997 offer stated that:

> "Upon execution of this Agreement, Cooperative will make available or place on order the following equipment: (a) A load share of substation transformer and existing distribution system. (b) On site underground distribution cable from existing overhead distribution to points of delivery. (c) Up to four (4) 2500 kVA 7200/12470 volt to 277/480 volt pad mount transformers two (2) for service to the hospital and two (2) for service to the energy plant.) (d) One (1) 1000 kVA 7200/12470 volts to 120/208 volt pad mount transformer to provide service to the medical office buildings. (e) Associated switch gear required."

The second offer contained somewhat similar terms, except that it provided for a five year term for the provision of service, and underground distribution facilities. Both offers also provided that the agreement was not effective unless approved in writing by the Rural Utilities Service. Pee Dee's February 28 offer provided that the term of the agreement was ten years. It did not provide that Pee Dee would place its facilities along Highway 151 underground. The March 26, 1997 offer had three signature lines for H.M.A.

Neither of Pee Dee's offers were signed by H.M.A. Both offers clearly contemplated that Pee Dee would not order any equipment until H.M.A. had accepted the

offer by signing in the appropriate places and, even after such acceptance, it was still not a binding agreement until the Rural Utilities Service approved the agreement. The RUS never approved either proposal.

Attached to the second offer was the applicable Pee Dee rate schedule, "Large Industrial Power Service Exhibit 'C'." In the first paragraph of this rate schedule, labeled "Availability," it states that:

> "Throughout all the territory served by the Cooperative, in accordance with the established Service Rules of the Cooperative and subject to the execution of a contract for service mutually agreed upon by the Cooperative and the consumer."

Thus, even the rate schedule that would be used to establish the rates to be charged H.M.A. required the execution of a service agreement.

Each Pee Dee offer was over 20 pages in length. Both addressed payment terms, membership in Pee Dee, service standards, right-of-way, limitation of liability, load management notification, and other pertinent provisions. It is very apparent that all that really happened on February 14, 1997 was that Mr. Vaughn told Pee Dee what additional terms or changes needed to be made to Pee Dee's offer in order for it to be considered.

In summary, on February 14, there was no offer because Mr. Williams had to get Board approval to make an offer that H.M.A. would consider. There was no acceptance because Mr. Vaughn did not have the authority to bind H.M.A. and he never told Pee Dee they had an agreement. There was never a meeting of the minds between Pee Dee and H.M.A. It was clearly contemplated by both parties, and, in fact, required by Pee Dee's procedures, that any acceptance be in writing. Pee Dee was not willing to relocate its facilities located on the property without a written acceptance, its rate schedule required a

written acceptance, the Letter of Intent required a written acceptance, and the actual proposed Electric Service Agreement required a written acceptance prior to Pee Dee ordering any facilities and, in fact, not only required a written acceptance but, also approval by the Rural Utilities Service. Since there was no offer, and no acceptance, there was no meeting of the minds.

Pee Dee states that, by letter dated April 15, 1997, H.M.A. notified the South Carolina Bureau of Health Facilities and Services Development that:

> "Electrical company proposal analysis has been completed with the best proposal chosen. This selection will be announced at a later date."

Pee Dee claims that Pee Dee was the "electrical company" referred to in the letter. However, the letter is devoid of any indication of which supplier was being referenced.

Pee Dee also points to a letter dated April 24, 1997 written by Page Vaughan to Robert Williams in which he notifies Mr. Williams that H.M.A. was reconsidering the utilities' proposals and that a final decision would be made within the next several weeks. Mr. Vaughan explained that this reconsideration involved the fact that sometime during March he discovered that H.M.A. had overestimated the electrical demand of the new hospital. Once the smaller, correct electrical demand was used in evaluating the utility proposals, from a rate perspective, CP&L's and Pee Dee's proposals were practically identical. That is what Mr. Vaughan stated he meant by "reconsidering," i.e., reevaluating the utility offers based upon this new information. He testified he did not mean that he had agreed to obtain electrical service from Pee Dee and was now changing his mind.

Finally, Pee Dee raises the issue of promissory estoppel, claiming that based upon H.M.A.'s alleged promise to obtain its electrical service from Pee Dee, it went ahead and ordered the necessary substation equipment and, due to this detrimental reliance, it is now forced to pay for a substation facility it does not need. Therefore, according to Pee Dee's reasoning, H.M.A. must take service from Pee Dee even if there was no agreement. The elements of promissory estoppel are not present in this case. In addition, even if promissory estoppel did apply, Pee Dee's only remedy would be the reimbursement of the cost of the facilities that were purchased that are not needed. Promissory estoppel would not require that H.M.A. obtain its electrical service from Pee Dee.

The elements of promissory estoppel are presence of a promise unambiguous in its terms, reasonable reliance upon the promise by the party to whom the promise was made, the reliance is expected and foreseeable by the party making the promise, and the party to whom the promise is made sustains an injury in reliance on the promise. (Prescott v. Farmers Telephone Co-op., Inc., 328 S.C. 379, 491 S.E.2d 698 (Ct. App. 1997).

Given that H.M.A. had read previous offers by Pee Dee, it was aware that the proposed offer included a provision that Pee Dee would not order any equipment until H.M.A. executed a written agreement. Thus, even if a promise was made by H.M.A. on February 14, which was not the case, it was not foreseeable that Pee Dee would order equipment or take any other action in reliance upon it until a written agreement was signed. In addition, Pee Dee did not, and could not have reasonably relied upon the alleged promise, because Pee Dee knew that according to the terms of its own written offer, it was not to purchase any facilities until there was a written agreement and the Rural Utilities Service had approved the agreement. H.M.A. had no reason to believe that

Pee Dee would violate its own practices and disregard the language of its own proposed Electric Service Agreement and proceed to order equipment prior to a binding agreement being established. Therefore, promissory estoppel has no application to this case.

Thus, it is apparent that there was no agreement entered into between Pee Dee and H.M.A., and H.M.A. never chose Pee Dee as its electric supplier.

Further, we hold that, under the circumstances of this case, Hartsville H.M.A. had the ability to choose and contract with either Pee Dee or with CP&L to supply its electricity at the Byerly Hospital, and since Hartsville chose CP&L, we again uphold that choice. This is based on our analysis of the application of the Territorial Assignment Act (the Act) to the facts in the case at bar. The situation presented is clearly one of "customer choice" under the Act.

The original testimony and exhibits of Dennis Turner for CP&L and Al Lassiter for the Coop. are determinative. It appears that the site of the proposed construction is a mixture of unassigned territory, CP&L assigned territory, and areas within 300 feet of lines of both CP&L and Pee Dee (corridors). Turner's exhibit was a scale drawing which shows the four (4) medical facilities which are to be constructed as part of the hospital complex and the location of an old Coop. line which ran perpendicular to Highway 151 into the site, with 300 foot corridors. Turner determined that a portion of the facilities consisting of the hospital, the medical office building, and the energy building lie more than 300 feet from the old Coop. line. Specifically, approximately 20 percent of the energy building lies more than 300 feet from the old Coop. line. Turner finally states that none of the three buildings lie totally within 300 feet of the old Coop. line. Lassiter, testifying on behalf of Pee Dee, notes that the main building of the hospital is located

within the corridor created by the Pee Dee line, "except for an outside portico." Also, the Medical Office Building is within the same corridor, "except for a covered driveway." The energy plant, according to Lassiter, is "almost entirely" within the Pee Dee corridor. (But see Turner testimony as quoted above.) Apparently, the fourth building, a future office building, is not being built or planned for the near future. It appears from Lassiter Exhibit 6 (part of Hearing Exhibit 12) that the "outside portico" area lies in unassigned territory, and the "covered driveway," and the "20 percent of the energy building" lie in CP&L territory. Also, it appears that parts of the planned parking lot and one of the driveways is within overlapping corridors of both electric suppliers, since both suppliers had lines running along the highway in front of the planned hospital site.

S.C. Code Ann. Section 58-27-620 (1976) reads, in part, as follows: "With respect to service in all areas outside the corporate limits of municipalities, electric suppliers shall have rights and be subject to restrictions as follows: .....(1)(d) If chosen by the consumer, any premises initially requiring electric service after July 1, 1969, (i) Which are located wholly or partially within three hundred feet of the lines of such electric supplier and also wholly or partially within three hundred feet of the lines of another electric supplier, as each of such supplier's lines exist on July 1, 1969 or as extended to serve consumers that the supplier has the right to serve or as acquired after July 1, 1969, ...(iii) Which are located partially within a service area assigned to such electric supplier and partially within a service area assigned to another electric supplier pursuant to Section 58-27-640 or are located partially within a service area assigned to such electric supplier pursuant to section 58-27-640 and partially within three hundred feet of the lines of another electric supplier, or are located partially within three hundred feet of the lines of

such electric supplier, as such lines exist on July 1, 1969, or as extended to serve consumers it has the right to serve or as acquired after that date, and partially within a service area assigned to another electric supplier pursuant to section 58-27-640.....

The term "premises" is significant in this context. S.C. Code Section 58-27-610(2) (1976) states that the term "premises" means the building, structure or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for farming, business, commercial, industrial, institutional or governmental purposes, shall together constitute one "premises...."

In prior cases, we have taken a broad view of what constitutes "premises." In our Order No. 85-1002 in Docket No. 85-186-E on December 2, 1985, in the case of Aiken Electric Cooperative, Inc., Complainant, vs. South Carolina Electric & Gas Company, Inc., Respondent, we held that the premises in that case... "consisted of a number of structures including a large brick building which contained a liquor store, a convenience store/party shop, and a service station, four gasoline dispenser pumps, gasoline tanks with pumps to serve the pump dispensers, a lighting system running down Martintown Road for approximately 300', a lighted canopy covering a fuel dispenser island including two diesel dispensers and one gasoline pump dispenser, and diesel and regular gasoline fuel tanks with submersible pumps to serve the pump dispensers...There were three driveway cuts to allow traffic access to the premises and the entire premises was paved with asphalt, concrete and/or gravel ("crusher run")..." Clearly, in that case, external features, such as parking lots and/or driveways were considered part of the premises.

We think the same principle applies in the case at bar. Specifically, the portico is part of the main hospital building, and the covered driveway is part of the medical building. The energy building lies within Pee Dee's corridor and CP&L's territory. We also note that a parking lot and driveway appurtenant to the main hospital and the medical building lie in a combination of overlapping corridors for both suppliers, Pee Dee's corridor, CP&L's assigned territory and unassigned territory.

Therefore, we hold that the main hospital with the portico, the medical building with the covered driveway, and the energy building fall under S.C. Code Ann. Section 58-27-620(1)(d)(iii), which states that such premises have a customer choice for an electric supplier which "are located partially within a service area assigned to such electric supplier...and partially within three hundred feet of the lines of another electric supplier..." Also, the parking lot and driveway appurtenant to the main hospital building and the medical building fall under S.C. Code Ann. Section 58-27-620 (1)(d)(i), which holds that customer choice is dictated when premises "are located wholly or partially within three hundred feet of the lines of such electric supplier and also wholly or partially within three hundred feet of the lines of another electric supplier, as each of such supplier's lines exist on July 1, 1969,"....

Accordingly, we hold that the choice of electric supplier in this case clearly came under the "customer choice" provisions of the Code as stated above. Under the circumstances of this case, Hartsville had the right to choose CP&L as its electric supplier, and in our view, properly did so. We also hold that no enforceable contract for the provision of electric service between Hartsville and Pee Dee was ever completed, nor

did Hartsville ever choose Pee Dee as its electric supplier. Further, estoppel is not applicable under these circumstances.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)